

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

JAMES McCRAY,	:	CIVIL NO. 4:06-CV-00937
	:	
Plaintiff	:	(Judge McClure)
	:	
v.	:	(Magistrate Judge Smyser)
	:	
DAUPHIN COUNTY PRISON and	:	
KIRK BOYLSTEIN,	:	
	:	
Defendants	:	

REPORT AND RECOMMENDATION

On May 5, 2006, the plaintiff, James McCray, commenced this action by filing a complaint. On June 14, 2006, the plaintiff filed an amended complaint.

By an Order dated June 21, 2006, we ordered the Clerk of Court to serve the plaintiff's amended complaint on the defendants.

On August 7, 2006, the plaintiff filed a motion for a default judgment and a brief in support of that motion. There was no return of service in the file by the Marshal

and, spurred by a telephone inquiry by the plaintiff, the undersigned's courtroom deputy contacted the Marshal in September and discovered that the Marshal had no record of the case. The Clerk again sent the amended complaint to the Marshal for service.

On September 26, 2006, the Marshal filed a return of service indicating that defendant Boylstein waived service of the summons and amended complaint but that the Dauphin County Prison had not been served.

On November 13, 2006, both defendant Boylstein and defendant Dauphin County Prison filed a motion to dismiss and/or for summary judgment, a brief in support of that motion and a statement of material facts.

In this Report and Recommendation, we address the plaintiff's motion for a default judgment.¹ We recommend that

¹ We note that the motion to dismiss and/or for summary judgment filed by the defendants is not yet ripe for decision. We will address that motion in a separate report and recommendation after that motion has been fully briefed by the
(continued...)

the plaintiff's motion for a default judgment be denied. The initial delay in service of the amended complaint was due to the Marshal not having a record of the case despite the Order of June 21, 2006 directing service. The defendants have now responded to the amended complaint by filing a motion to dismiss and/or for summary judgment. There is no basis to enter default or a default judgment against the defendants. Accordingly, the plaintiff's motion for a default judgment should be denied.

Based on the foregoing, it is recommended that the plaintiff's motion (doc. 10) for a default judgment be denied and that the case be remanded to the undersigned for further proceedings.

/s/ J. Andrew Smyser

J. Andrew Smyser
Magistrate Judge

Dated: November 15, 2006.

¹(...continued)
parties.